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## *EEOC Reverses Course in Proposed Wellness Program Regulations*

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Last Thursday, the Equal Employment Opportunity Commission (“EEOC”) published its much anticipated proposed regulations explaining how employers may structure wellness programs without violating the Americans with Disabilities Act’s (“ADA”) limitations on disability related questions and/or medical examinations. The proposed regulations constitute a welcome reversal of EEOC policy on this issue. While there are several remaining issues with which employers must wrestle, the regulations would, if finalized, help align the ADA closer to the treatment of wellness programs under the Affordable Care Act (“ACA”) and the Health Insurance Portability and Accountability Act (“HIPAA”). The comment period for the proposed regulations closes June 19, 2015.

Part I of this Client Alert provides a brief description of the kinds of wellness programs employers are currently using, Part II provides an overview of the EEOC’s historical position regarding the ADA and wellness programs, Part III outlines key provisions of the proposed regulations and Part IV outlines key considerations for employers.

### **I. Background**

The ACA and HIPAA together expressly allow—or even encourage—employers and group health plans to offer financial incentives (premium discounts or rebates or employee cost sharing modifications) to employees who are willing to cooperate in “wellness programs” designed to promote healthy lifestyles and prevent disease. Indeed, the U.S. Department of Labor has emphasized the ACA’s critical role in encouraging employers to use this sort of incentive structure to “promote employer wellness programs and encourage opportunities to support healthier workplaces.”

And they seem to be popular. A Kaiser Family Foundation poll recently found that 94% of employers with over 200 employees, and 63% of smaller ones, offer some sort of wellness program.

Wellness programs come in two varieties. Some programs are “participation only” programs where employees are rewarded for engaging in activities that are believed to offer a long-term benefit for employee health (and reduced employer health costs) such as joining a gym, taking a healthcare survey, or attending health care seminars. Because these activities, by definition, are not linked to any specific health factor or medical condition (such as obesity or smoking), the programs and their incentives have long been considered lawful under HIPAA when they are voluntary and open to all “similarly situated” employees and beneficiaries.

The second variety are “outcome based” programs that condition the reward requirement on a specific “health factor,” such as remaining tobacco free, maintaining a specific blood cholesterol level, or achieving a specified body mass index. This kind of program is available only to individuals with certain health factors rather than everyone, and thus must conform to HIPAA’s nondiscrimination regulations.<sup>1</sup>

## II. EEOC’s Historical View

Notwithstanding the strong endorsement of wellness programs in the ACA and HIPAA and their implementing regulations, the EEOC has taken a far more skeptical view of any program that would condition something of value on an employee’s willingness to submit to a “medical inquiry,” to undergo a “medical examination,” or otherwise to disclose medical information about the employee and his or her family members. Once financial consequences are linked to participation in such a wellness program, the EEOC indicated, it can become an “involuntary” inquiry and becomes suspect under the ADA, the Genetic Information Nondiscrimination Act (“GINA”) or both.

First, the EEOC said that any medical inquiry contemplated by such a program can be lawful under the ADA only if it is truly voluntary; a program is not voluntary if employees can be “penalized” for deciding not to participate. Similarly, the EEOC said that “covered entities” under GINA may not offer “financial inducements for individuals to provide genetic information [about family members] as part of a wellness program.” 29 C.F.R. §1635.8(b)(2)(ii). Thus, where an employer provides some incentive to an employee to induce the employee or his or her spouse to undergo cholesterol, blood sugar, or other “biometric” testing, the EEOC has contended that GINA and the ADA are implicated.

Only one appellate decision addresses the application of the ADA to a wellness program. In *Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012), the county implemented a program comprised of “biometric screening” (a finger stick for glucose and cholesterol) and an online health risk assessment. On the basis of the results, the county’s health plan identified those at risk for a series of health conditions, and offered them the opportunity to participate in a disease management program. Participants—but only participants—became eligible for co-pay waivers on certain medications. Although participation was not mandatory, those who refused to participate in the program were subject to a special surcharge (the county thereafter eliminated the surcharge).

The Eleventh Circuit concluded that the plan was lawful under the ADA because it fit within a “safe harbor” that exempts certain insurance plans from the Act’s prohibition on “required” medical examinations and disability-related inquiries.” 42 U.S.C. § 12201(c)(2). That safe harbor provision “states that the ADA ‘shall not be construed’ as prohibiting a covered entity ‘from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.’” *Seff*, 699 F.3d at 1223. Although the wellness program was not expressly made a “term” of the plan itself in this instance, the Eleventh Circuit held that a program need not be “explicitly identified in a benefit plan’s written documents to qualify as a ‘term’ . . . within the meaning of the ADA’s safe harbor provision.” *Id.* at 1224.

The EEOC, however, strongly disagreed with this result. In a case brought last year to enjoin Honeywell’s wellness program, the EEOC argued that the safe harbor only applies to the actual practice of underwriting or “classification” of risks. According to the EEOC, the biometric testing and survey in *Seff* were not designed to “classify” risks so much as reduce them, and therefore the safe

harbor is inapplicable. Further, the agency argued that it is irrelevant to the ADA question that the program had complied with all of the requirements (specified above) of HIPAA and ACA.

The EEOC's enforcement activity against wellness programs that were lawful under the ACA and HIPAA drew widespread condemnation in the employer community and led to Congressional hearings and proposed legislation providing that neither the ADA nor GINA would be violated if wellness programs offered rewards up to the percentages allowed under the ACA and HIPAA.

### **III. Key Proposed Regulation Provisions**

The newly proposed regulations would modify EEOC's enforcement stance on wellness programs. Under these proposed regulations:

- A wellness program, including any disability-related inquiries or medical examinations that are part of such a program, must be reasonably designed to promote health or prevent disease. This requirement is met if the program has a reasonable chance of improving the health of, or preventing disease in, participating employees, and it is not overly burdensome, is not subterfuge for violating the ADA or other laws prohibiting employment discrimination, and is not highly suspect in the method chosen to promote health or prevent disease.
- If the program includes disability-related inquiries or medical examinations, the program will be considered voluntary if it does not require employees to participate; does not deny coverage under any group health plan or benefits package based on non-participation, or limit benefits for employees who did not participate; and does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees.
- If the program is part of a group health plan, the employees must be provided with a notice written in a manner reasonably likely to be understood by the employee from whom medical information is being solicited, describing the types of medical information being obtained and the specific purposes for which it will be used as well as the restrictions on the disclosure of the information, the parties with whom the information will be shared, and the methods that will be used to safeguard the information under HIPAA's Privacy Standards.
- The reward or penalty imposed under the program must not exceed 30 percent of the cost of employee-only coverage.
- The medical information collected may not be shared with the employer except in aggregate form that is not reasonably likely to identify specific employees, except as needed to administer the health plan.
- The EEOC requested specific comments on a number of specific issues. For example, the EEOC asks whether wellness program incentives may not be so large as to render health insurance unaffordable under the ACA.

### **IV. Key Considerations for Employers**

Although the regulations would move the EEOC closer to the standards applicable under ACA and HIPAA, the gap is not entirely closed. The differences could be a trap for the unwary. Employers should particularly note the following:

- The proposed regulations would apply to participation-only programs as well as outcome-based programs if under either program medical or disability information is solicited.
- The proposed regulations would apply the 30 percent incentive limitation on smoking cessation programs, even though the HIPAA regulations allow a 50 percent limitation. However the EEOC would not consider a program that merely asks employees whether they use tobacco as a disability-related inquiry subject to this limitation. On the other hand, if the program tests for nicotine usage through a biometric screening or other medical exam, the 30 percent incentive limitation would apply.
- If certain requirements are met, the HIPAA wellness regulations allow incentives that are up to 30 percent of the total cost of coverage in which the employee and any of the employee's dependents are enrolled. The proposed EEOC regulation is limited to the total cost of self-only coverage in all circumstances.
- The proposed regulations do not address the extent to which Title II of GINA affects an employer's ability to condition incentives on family members' participation in a wellness program. The EEOC stated in the preamble that this issue will be addressed in future EEOC rulemaking.
- The EEOC stated in the preamble that it continues to disagree with the Eleventh Circuit's view in *Seff* and does not believe the insurance safe harbor can exempt wellness programs from the ADA.

Employers are advised to carefully review their wellness program design, use and documentation to determine whether modifications are warranted in light of these proposed regulations.



*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

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<sup>1</sup> See 78 Fed. Reg. 33158 (2013). To be lawful under HIPAA, (1) the program must be available to all “similarly situated” employees; (2) the program must be “reasonably designed” to promote health or prevent disease; specifically, it must: (a) have a “reasonable chance of improving the health of, or preventing disease in” the participating individual, (b) not be “overly burdensome”, (c) not be a subterfuge for discriminating on the basis of a health factor, and (d) not be “highly suspect” in its methods; (3) participants must have the opportunity to qualify for the program at least annually; (4) if a medical condition makes it unreasonably difficult to meet the health factor-based standard, or it is ill-advised for the employee to try to meet the standard, the plan must offer a “reasonable alternative standard” to be worked out between the plan and the individual on a case-by-case basis; (5) the terms of the wellness incentive requirement must be disclosed in all plan materials describing the program; and (6) the reward for all outcome-based wellness programs cannot exceed 30% of the cost of coverage, taking into account both employer and employee contributions; the maximum is increased to 50% for tobacco cessation programs, so long as the combined reward for meeting both tobacco and non-tobacco related requirements do not exceed the 50% limit. The “reward” may be either a discount or a surcharge based on compliance with the program. For more information on HIPAA’s requirements for wellness programs, please see our Client Alert *Employer Wellness Programs – Final Rules Under the Affordable Care Act (May 31, 2013)*, available at [www.paulhastings.com/publications](http://www.paulhastings.com/publications).

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